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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP WILLIAM ODOM, JR., Defendant and Appellant.	C068197 (Super. Ct. No. 09F06034)

A jury found defendant Phillip William Odom, Jr., guilty on one count of a lewd and lascivious act on a child under the age of 14 years by force and on seven counts of lewd and lascivious acts on a child under the age of 14 years. On appeal, defendant contends: (1) there was insufficient evidence to support all or some convictions, (2) the trial court prejudicially failed to instruct the jury that, before considering defendant's prior uncharged misconduct evidence, the jury must determine if he had the capacity to commit a crime; and (3) even if some errors were harmless, the cumulative effect of the errors was prejudicial and requires reversal. As none of the contentions has merit, we affirm the judgment.

FACTS

Defendant is the half-brother of H., who was born in July 1999. H. lived with her mother but visited her father on the weekends. Defendant and H. have the same father, but different mothers. Defendant lived with their father.

Prior Acts

When H. was five years old and in kindergarten and defendant was 13 years old, H. visited her father and defendant most weekends. H. testified that, although it happened a few times, she remembered one time specifically when defendant kissed her on her cheek and arms. She stated that the way he kissed her "just didn't feel right." Once or twice while giving her a bath, defendant touched her back and upper thigh with his hand. She testified that the touching did not feel right and that "[i]t was wrong."

Kristin Scott was H.'s kindergarten teacher. She testified that H. told her that she had a secret to tell her. H. told her teacher that defendant had touched her "privates." H. said that she had told her father, and that defendant had gotten in trouble. Because of Scott's mandatory reporting duties, she filed a report with Child Protective Services (CPS). CPS acted on the report by interviewing H. and her teacher. At the interview, H. did not repeat what she had told her teacher. Despite several attempts, CPS was unable to contact defendant's father to discuss the situation.

At trial, H. testified that defendant *did not touch* her privates when she was in kindergarten. She did not remember the meeting or telling her teacher, *but remembered telling her mother about the touching*. H. stated that she never talked to her father or defendant about what had happened.

Current Crimes

Over the next four years, nothing inappropriate happened between H. and defendant. By this time, H. was nine years old and defendant was living with his mother, Geraldine, in an apartment two doors away from his and H.'s father. While visiting her father, H. would often visit defendant at Geraldine's apartment to play video games. It

was a small apartment, so when she spent the night there, she would sleep on a couch, and defendant would sleep on another couch in the same living room.

H. testified that the sexual abuse started while she was spending the night at Geraldine's apartment. After staying up late playing video games, H. changed into her pajamas and went to sleep on one couch. When H. went to sleep, Geraldine was sleeping in her room and defendant was on the computer. H. testified that she woke up to find her pajama pants and underwear pulled down to her ankles. She was lying on her stomach with defendant on top of her. He then put his penis into her anus. He threatened to hurt her if she told anyone. H. testified that, after he laid on her for about one minute, he got up and put a white sports sock on his penis until it became wet. H. then pulled up her pants and went back to sleep. Defendant went to sleep on the other couch. The next morning he "acted natural like nothing happened," and pretended that everything was okay. She never said anything to defendant, and he never said anything to her. She was afraid to tell her mother because she thought he was going to hurt her.

The next weekend H. went to Geraldine's apartment because she wanted to play video games with defendant rather than stay in her father's dirty apartment. That night defendant put his penis into her anus again.

H. estimated that defendant abused her 20 to 25 times, but admitted that she was just guessing. Sometimes he sexually abused her on the couch and sometimes on the floor behind the couch, but it was always in the same manner.

H. recalled that the first time it happened on the floor behind the couch was one night after they had been eating pizza and watching television. She awoke when defendant picked her up and placed her on the couch that he slept on. He then pushed the couch she usually slept on forward enough for them to both fit behind the couch. He then placed H. on her stomach on the floor behind that couch, and molested her in the same manner as before. H. tried to pull herself away this time, but failed. H. stated that most of the time defendant would threaten to hurt her if she told anyone about the abuse. H.

testified that he abused her two to five times on the floor behind the couch, and that it was always in the same manner.

H. eventually told her mother that defendant had been sexually abusing her. H. then told a CPS worker and a number of police officers about what had happened. During a Special Assault Forensic Evaluation (SAFE) interview, H. described the sexual assaults in great detail. She estimated that it happened 27 or 33 different times. Later in the interview, H. estimated that it happened 19 times on the couch and eight or nine times on the floor behind the couch. She stated that the first time it happened was around September 2008 and the last time was somewhere in the middle of February 2009.

H. made a pretext phone call to defendant, and she told him that she was thinking about telling her mother what he had been doing to her. In response, he answered, "Why?" She then asked him why he had done those things to her, and he responded, "I don't know." Defendant claims that during this phone call, he was simultaneously having an argument with his girlfriend so he was distracted. He claims that some statements on the transcript were actually directed toward his girlfriend rather than H. He further claims that when H. told him that she was thinking about telling her mother about what he had done, that he answered "what" instead of "why."

H. was physically examined at the U.C. Davis Care Center. She had three fissures or lacerations in her anal area. Because the nurses needed to wait and see if the fissures would heal on their own, they scheduled a follow-up exam one month later. Cathy Boyle, the pediatric nurse practitioner who conducted the follow-up exam, testified that two of the three fissures remained. The fissures, by themselves, did not indicate sexual abuse. It was determined that H. had chronic anal fissures. Boyle could not determine exactly what caused them because they could have been caused by sexual abuse, constipation, or dry skin. She was not surprised to see the absence of trauma in H.'s anal area because that area heals rapidly without scarring.

Psychologist Dr. Anthony Urquiza testified as an expert in child sexual abuse. He explained that child sexual abuse accommodation syndrome includes five components: secrecy, helplessness, entrapment and accommodation, delayed or unconvincing disclosure, and retraction. Dr. Urquiza explained that perpetrators often manipulate the relationship with victims by providing special attention and favors. They then use threats to keep their victims quiet about the abuse.

PROCEDURE

Defendant was charged by the second amended information with one count of committing a lewd and lascivious act on a child under the age of 14 years with force (count one; Pen. Code, § 288, subd. (b)(1)),[1] and seven counts of committing a lewd and lascivious act on a child under the age of 14 years (counts two through eight; § 288, subd. (a).) A jury found defendant guilty on all counts. The trial court sentenced defendant to an aggregate term of 14 years: three years each for counts one and two, to be served consecutively; two years each for counts three through six, to be served consecutively; and three years each on counts seven and eight, to be served concurrently. Defendant appeals.

DISCUSSION

I

Insufficiency of Evidence

Defendant contends there is insufficient evidence to support some or all convictions for committing lewd and lascivious acts. The contention is without merit.

On appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier

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1 All further statutory references are to the Penal Code unless otherwise specified.

of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

" ' "To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" ' [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 306 (*Barnes*).)

To sustain a conviction under section 288, subdivision (b)(1), as charged in count one here, the prosecution must prove: (1) defendant willfully touched any part of a child's body either on bare skin or through the clothing; (2) defendant used force or fear of immediate and unlawful bodily injury in committing the act; (3) defendant committed the act with the intent of arousing or gratifying his sexual desires; and (4) the child was under the age of 14 years at time of the act. (§ 288, subd. (b)(1); CALCRIM No. 1111.)

Conviction under section 288, subdivision (a), as alleged in counts two through eight, requires proof that: (1) defendant willfully touched any part of a child's body either on bare skin or through the clothing; (2) defendant committed the act with the intent of arousing or gratifying his sexual desires; and (3) the child was under the age of 14 years at the time of the act. (§ 288, subd. (a), CALCRIM No. 1110.)

Defendant argues that H.'s testimony was improbable and insufficient as a matter of law to support all or some of the charges because (1) her pretrial statements and trial testimony were contradictory and (2) the evidence presented does not sufficiently

demonstrate that the abuse occurred over a six-month period from September 1, 2008, to February 29, 2009. We disagree.

The substantial evidence question in this case is whether there was enough reasonable, credible evidence to support the conclusion that defendant willfully touched his penis to H.'s anus at least eight times at some point during the six-month period from September 1, 2008, to February 29, 2009. H. was uncertain about the number of times and exactly when the sexual abuse occurred. At trial she estimated that defendant abused her, always in the same manner, 20 to 25 times in total, but admitted that she was just guessing. However, during the SAFE interview, H. stated that it happened "33 or maybe 27 times," but at trial she stated that she was not telling the truth during the SAFE interview.

At trial H. estimated that defendant abused her on the floor behind the couch two or three times. A short time later while still on the stand, she changed that estimation to four or five times.

Additionally, H. was uncertain of the specific dates when the abuse occurred. She stated in the SAFE interview that the first time it happened was two months after she turned nine [early September 2008] and the last time it happened was in February 2009. At trial, however, she testified that the first time she went over to Geraldine's apartment was on November 22, 2008, and that the last time the abuse happened was in mid-December 2008. Later, when given a calendar on cross-examination, she stated the first time defendant sexually abused her was on December 8, 2008. Soon after, she stated that the last time she was abused was on January 13, 2009. H. repeatedly stated that she could not remember specific dates, but did her best to pick a specific date.

Even though there were some discrepancies as to the number of times and exact dates of sexual abuse, her testimony was not without credibility. (See *Barnes, supra,* 42 Cal.3d at p. 306.) She was 11 years old when she testified at trial. It had been more than two years since she was abused at Geraldine's house. Throughout her testimony, she

stated that she was unsure of exact dates. Indeed, on cross-examination, she stated that she was only 15 percent sure that she circled the correct date. H. did her best to remember the dates under the circumstances. (See *Barnes, supra,* 42 Cal.3d at p. 306.) In any event, the dates she included in her testimony placed the abuse within the dates alleged.

Defendant argues that generic testimony should not be sufficient for conviction. He attempts to distinguish *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*) by stating that the acts here were not continuous and, since defendant was not charged with continuous sexual abuse of a child, generic testimony should not suffice. We disagree.

In *Jones*, the defendant was charged with several counts of lewd and lascivious acts with a minor (§ 288, subd. (a)) committed during various time periods, and the charges were supported by generic testimony. (*Jones*, *supra*, 51 Cal.3d at pp. 299-300, 321.) The court held that the jury could find a defendant guilty of more than one indistinguishable act as long as the victim's testimony described the nature of the sexual acts, the frequency of the acts, and the general time period for the acts. (*Id*. at pp. 316, 321.)

Here, defendant committed multiple acts of sexual abuse during the time period charged, and the charges were supported by the testimony of H. that, although she could not remember the exact dates, defendant committed many separate acts (20 to 25) during that time. H.'s testimony described the nature of the sexual acts (defendant put his penis into her anus), the frequency of the acts (20 to 25 times altogether), and the general time period (Sept. 2008 to Feb. 2009). This level of testimony, though general as to dates but specific as to acts committed, was sufficient to establish the substantiality of the victim's testimony. (*Jones*, *supra*, 51 Cal.3d at p. 316.)

II

Capacity to Commit a Crime

Children under the age of 14 are deemed incapable of committing a crime unless the evidence provides "clear proof that at the time of committing the act charged against them, they knew its wrongfulness." (§ 26.) In this case, the prosecution, to support an inference that defendant has a propensity to molest children (Evid. Code, § 1108), introduced evidence that defendant molested H. when defendant was 13 years old. On appeal, defendant contends that the trial court had a duty to instruct the jury, sua sponte, that it could not consider defendant's prior act unless it determined that defendant knew its wrongfulness. The contention is without merit because (1) defendant allowed the evidence to be admitted without objection and without a request for instruction on the capacity issue, (2) there is no duty to instruct, sua sponte, on such a peripheral issue, and (3) even assuming error in not instructing as defendant now suggests, the error was harmless.

During motions in limine, the court asked defense counsel, "There is a request to admit the incidents involving [H.] from 2004 under Evidence Code Section 1108. [¶] [Counsel], do you have a position on that? It's my understanding that might come in anyhow." Defense counsel answered, "Correct. I would submit at this point." After the prosecution stated that the it might not introduce the prior sexual misconduct at all, defense counsel stated that defendant might "seek to admit it even if the DA does not." Defendant did not seek instruction on capacity concerning his acts committed when he was 13 years old.

Recently, the California Supreme Court held that a trial court has no duty to instruct the jury, sua sponte, concerning capacity relating to Evidence Code section 1108 evidence. (*People v. Cottone* (2013) 57 Cal.4th 269, 293 (*Cottone*).) When the prosecution seeks to introduce evidence of a prior sexual offense to show propensity, the issue of whether the defendant had the capacity to commit the prior sexual offense is a

preliminary question for the court to determine. (*Id*. at p. 285.) "[U]pon the defendant's timely objection, the trial court must find by clear and convincing evidence that the defendant had the capacity to commit an unadjudicated juvenile offense before admitting that evidence under [Evidence Code] section 1108." (*Id*. at p. 292.)

Here, defendant did not object to admission of the prior offense evidence. Instead, defense counsel stated that the defense might have introduced the evidence if the prosecution had not. Accordingly, because defendant neither objected to the evidence nor requested a jury instruction, he forfeited the issue and cannot complain on appeal that the trial court should have handled admission of the evidence and instruction of the jury differently.

Defendant asserts that *Cottone* is distinguishable because, in that case, the trial court actually made a finding concerning the defendant's capacity to commit the prior offense. As noted, however, the Supreme Court held that such a determination is unnecessary unless the defendant objects to admission of the evidence. (*Cottone*, *supra*, 57 Cal.4th at p. 292.)

Defendant also asserts, citing *People v. Lewis* (2001) 26 Cal.4th 334, at pages 379 through 380, that, since the trial court did not make a finding concerning defendant's capacity to commit the prior offense, the court was required to submit the question to the jury. To the contrary, the *Cottone* court made it clear that the discussion in *Lewis* of submitting the capacity issue to the jury was a harmless error analysis. The *Lewis* court held that the defendant was not prejudiced by the trial court's failure to determine capacity because the issue was submitted to the jury. According to *Cottone*, *Lewis* is not authority for the proposition that the capacity issue *must* be submitted to the jury. (*Cottone, supra,* at pp. 291-292.)

Finally, defendant asserts that *Cottone* was wrongly decided. We need not consider that assertion because we are bound by the Supreme Court's decision. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, any error in not instructing the jury concerning capacity to commit the prior offense was harmless beyond a reasonable doubt. The asserted error did not rise to the level of structural error because it was merely tangential to proof of defendant's guilt of the crimes prosecuted in this case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [113 L.Ed.2d 302, 331]; *People v. Flood* (1998) 18 Cal.4th 470, 493.) Since defendant asserts the failure to instruct violated his federal due process rights, we apply the harmless-beyond-a-reasonable-doubt standard. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].) Under that standard, there was no prejudice. H.'s testimony detailed the sexual abuse that occurred at Geraldine's apartment. Testimony from police officers, CPS social workers, H.'s kindergarten teacher, and H.'s mother all corroborated H.'s testimony. Had the evidence of the prior uncharged misconduct while H. was in kindergarten been precluded, defendant would have fared no better.

Therefore, there was no error, and, even assuming error, it was harmless.

III

Cumulative Error

Defendant claims that the cumulative effect of the errors was prejudicial and requires reversal. We disagree. The trial court did not commit error in this case. Therefore, we reject defendant's contention of cumulative error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.